SUPREME COURT, U. S.

FILED
MAY 1 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted] Docket No. [redacted] 140

WILLIAM EARL BIGHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

OPINION BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATEMENT OF FACTS 2
A. The Conspiracy Count 3
B. Entrapment Instruction 4
C. The Jury Panel 4
REASONS FOR GRANTING THE WRIT 5
A Conspiracy Prosecution is Invalid Where One of the Two Parties is a Secret Police Agent Who Induces the Conspiracy Only to Trap the Defendant 5
The Court Deprived Petitioner of His Constitutional Right to Trial by Jury When it Refused to Submit the Defense of Entrapment to the Jury 7
Whether or Not Due Process Has Been Afforded in the Selection of the Jury Panel When All But One Selected Juror Has Been Chosen From Jacksonville, Florida, Rather than the Middle District at Large or a Division Thereof 10
Where Petitioner Suffered Severe Legal Consequences As a Result of Conviction on an Invalid Count of the Indictment the Appeals Court Erred in Refusing to Review the Invalid Counts 11
CONCLUSION 11
APPENDIX A – Opinion Of The United States Court of Appeals For The Fifth Circuit 12

CITATIONS

Cases:

Benton v. Maryland, 1969 ___ U.S. ___, 89 S.Ct. ___, 23 L.Ed.2d 707 11
Chatham v. United States (9 Cir. 1969), 411 F.2d 1139 8
Delaney v. State, 164 Tenn. 432, 51 S.W.2d 485 (1932) 6
Grunewald v. United States, 353 U.S. 391 (1956) 7

Harrison v. United States, (1925 CA 2 N.Y.) 7 F.2d 259, 263 6

Johnson v. U.S., 115 U.S. App. D.C. 63, 317 F.2d 127 (1963) 9

Lopez v. United States, 373 U.S. 427 (1963) 7

Odneal v. State, 117 Tex. Crim., 97, 34 S.W.2d 595 6

Pierce v. United States (5 Cir. 1969) 414 F.2d 163 9

Robison v. United States (9 Cir.) 379 F.2d 338, 345 8

Sagansky v. United States, 358 F.2d 195, 202-203 9

Solomon v. State, 168 Tenn. 180, 76 S.W.2d 331 6

Sorrells v. United States, 287 U.S. 435 7

United States v. Chase, 372 F.2d 453 (1967) 5, 6

United States v. Riley (2 Cir. 1966) 363 F.2d 955 9

United States v. Standard Oil Co. (DC), Ill. 1909, 170 F.998 10

United States v. Walton (9 Cir. 1969) 411 F.2d 283 8

Weeks v. United States, 232 U.S. 383 (1914) 7

Woodworth v. State, 20 Tex. App. 375 6

Miscellaneous:

91 ALR 2d 700 5

Florida Statutes 775.10 11

Criminal Conspiracy, 72 Harvard Law Review, 920, 926 (1959 6

Wharton's Criminal Law, Volume I, § 83, page 180 5

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WILLIAM EARL BIGHAM,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner William Earl Bigham prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of conviction entered in the United States District Court for the Middle District of Florida.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, is reported in ___F.2d___, case number 27285, decided January 28, 1970. A copy of the Opinion is appended.

JURISDICTION

The decision of the United States Court of Appeals was rendered on January 28, 1970. A petition for re-hearing was timely filed and denied on March 2, 1970. This Court extended to May 1, 1970, the time for filing the Petition for Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Will a federal conviction for conspiracy stand where one of the two parties to the conspiracy was a secret police agent who induced the conspiracy to trap the petitioner?

2. Whether the Court erred in refusing to give a jury instruction on entrapment although some evidence raising that defense was presented?

3. Whether the jury panel was improperly constituted because all but one of its members were residents of a single county in a division which contains fourteen counties?

4. Where petitioner suffered severe legal consequences as a result of conviction on an invalid count of the indictment, did the Court of Appeals improperly apply the concurrent sentence doctrine when it refused to review all counts of the indictment?

STATEMENT OF FACTS

Petitioner was charged in a three count indictment with (1) conspiring with co-defendant Shelby Devone Thrift to violate the counterfeiting laws; (2) selling and transferring counterfeit money; and (3) possessing counterfeit money. (Transcript, p. 143). Petitioner was convicted of all three counts and received a sentence of five (5) years imprisonment on each count; the sentences to be served concurrently.

Petitioner is a 47 year old rural businessman and a highly decorated veteran of World War II, with no previous criminal record. The counterfeiting episode began when petitioner

received a telephone call from an old friend and former employee, Westmoreland, who was then acting as a secret police agent. Westmoreland, acting under the direction of a United States Secret Service Agent, called and requested the petitioner to meet him on the pretext that he needed help.

Westmoreland testified that the following took place at the reunion meeting:

> "Mr. Bigham [petitioner] asked me where I had been and what I had been doing and why hadn't I contacted him: if I needed any help, he would help me." (Transcript, p. 27)

Westmoreland, then introduced petitioner to the Secret Service agent who was purportedly also trying to help Westmoreland. Both of them requested and convinced petitioner to obtain and pass to them counterfeit money. (Transcript, pp. ~~220-221~~ 28)

A. The Conspiracy Count

In Count I of the indictment, the government charged petitioner of conspiring with co-defendant Shelby Devone Thrift, "and with divers other persons whose names are to the Grand Jury unknown" to violate the counterfeiting laws. (Transcript, p. 43) The evidence established that co-defendant Thrift and petitioner did not conspire and the Court granted a judgment of acquittal as to Thrift. (Transcript, ~~p. 286~~) 3 of Proceedings, Dec 10th)

At trial, the prosecutor agreed with the Court that petitioner could not legally be found guilty of conspiring with Thrift since the latter was acquitted of the conspiracy charge. However, the government's counsel argued, both in the trial and in the Circuit Court, that petitioner could be found guilty of conspiring with the secret police agent, Westmoreland, who instigated and pretended to join a conspiracy so as to trap petitioner. The prosecutor made this assertion even though Westmoreland was not named as a co-conspirator in the indictment although his identity was well known to the government when petitioner was indicted.

The trial court adopted this novel conspiracy theory on which the conspiracy conviction was based. The Circuit Court refused to review the conspiracy count solely because petitioner received concurrent sentences.

Significantly, there was absolutely no evidence or even an allegation, that petitioner conspired with anyone other than Thrift or Westmoreland. Moreover, all of the conspiracy acts named in the indictment occurred at that time when Westmoreland was acting as a secret police agent.

B. Entrapment Instruction

At the trial's conclusion, petitioner's counsel requested a jury instruction on entrapment. The government attorney objected to an entrapment instruction on the ground that the facts did not warrant it. The trial court agreed and said:

> "I read the Lopez case [373 U.S. 427] and I'm convinced under the facts of this case and the application of the law as set forth in the Lopez case that I'll have to deny your Requested Charge No. 5 and will note your objection for the record." (Transcript, p. 41, Volume I)

The Court then precluded the defense from making a closing argument on entrapment. (Transcript, p. 42, Volume I)

C. The Jury Panel

The co-defendant Thrift moved the Court to Quash the Jury Panel. Attached to his Motion, as Exhibit No. 1, was the list sought to be quashed. The ground therefor was the fact all Jurors drawn and those who served were citizens and residents of Jacksonville, Florida, even though the Middle District consists of 33 counties and the Jacksonville Division consists of 14 counties. Neither of the defendants were citizens and residents of Jacksonville, Florida, or Duval County, Florida, but were residents of Alachua and Columbia County, Florida. Petitioner joined in that motion.

REASONS FOR GRANTING THE WRIT

I

A CONSPIRACY PROSECUTION IS INVALID WHERE ONE OF THE TWO PARTIES IS A SECRET POLICE AGENT WHO INDUCES THE CONSPIRACY ONLY TO TRAP THE DEFENDANT

The only co-conspirator named in the indictment was Shelby Devone Thrift. There was no evidence or allegation that petitioner conspired with anyone else. The Court directed a judgment of acquittal as to Thrift because of a lack of evidence that he participated in a conspiracy. Under the established Federal and State law, if one of the two conspirators is acquitted, the conviction of the other may not stand. See collection of cases cited in 91 ALR 2d 700. Recognizing this rule, the prosecutor sought to establish conspiracy by successfully urging the trial court to hold that petitioner conspired to pass counterfeit money to the secret police agent, Westmoreland. But Westmoreland could not be a conspirator because he combined with the defendant not for criminal purposes, but solely to trap the defendant for the police.

The government cannot successfully contend that there was a conspiracy with Westmoreland prior to petitioner's arrest because the overt acts in furtherance of the conspiracy, named in the indictment, all occurred after Westmoreland became a government agent. Petitioner was convicted of conspiring with Westmoreland for that time when Westmoreland only pretended to join the conspiracy.

In *Wharton's Criminal Law*, Volume I, § 83, page 180, it is said:

> "To be a conspirator, the defendant must have criminally intended to become a party to the conspiracy. It is accordingly held that a person who pretends to join a conspiracy in order to trap the criminals is not a co-conspirator."

In *United States v. Chase*, 372 F.2d 453 (1967), the

Court held that a government agent who enters into a purported conspiracy to trap a defendant cannot be a co-conspirator. Also see, *Criminal Conspiracy*, 72 Harvard Law Review, 920, 926 (1959).

Several states have held to this effect, with no opposite view apparent. In *Delaney v. State*, 164 Tenn. 432, 51 S.W.2d 485, (1932) the Supreme Court of Tennessee at page 487, said:

> "There can be no criminal combination or conspiracy unless at least two persons guiltily unite or agree in the purpose to pursue the unlawful enterprise; and, if one of the two only feigns acquiesence in the proposal of the other, without criminal intent, there is no such agreement or concurrence in fact, and no conspiracy. . . . And when the state, refusing to place the only alleged co-conspirator on trial, offers evidence establishing his innocence of any intention or purpose to enter into a conspiracy with the accused, it thereby proves affirmatively that there was no combination or conspiracy formed and that the statute was not violated."

To the same effect; see *Woodworth v. State*, 20 Tex. App. 375, *Solomon v. State*, 168 Tenn. 180, 76 S.W.2d 331; *Odneal v. State*, 117 Tex. Crim., 97, 34 S.W.2d 595.[1]

There exists a current popularity of adding a conspiracy count to indictments. Judge Learned Hand describes the conspiracy count as "that darling of the modern prosecutor's nursery." *Harrison v. United States*, (1925 CA 2 N.Y.) 7 F.2d 259, 263. The United States Supreme Court has said:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden

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[1] It can't be successfully contended that the conspiracy can be sustained on the grounds of conspiring with "unknown persons" since no one other than Westmoreland was shown to participate in any agreement. *U.S. v. Chase*, 372 F.2d 453 (1967)

the already pervasive and widesweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed." *Grunewald v. United States*, 353 U.S. 391 (1956)

II

THE COURT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY WHEN IT REFUSED TO SUBMIT THE DEFENSE OF ENTRAPMENT TO THE JURY

At the outset it should be made immediately clear that the entrapment defense was available but denied to petitioner on both the issue of passing and controlling counterfeit money, and on the issue of conspiracy. This is so as to the conspiracy count because the government's secret police agent, Westmoreland, admitted that it was he who first approached petitioner with the idea of passing counterfeit money. Nevertheless, the trial court refused to give the entrapment instruction as to any aspect of the case.

Petitioner asks for review of the entrapment instruction question on constitutional grounds. *Weeks v. U.S.*, 232 U.S. 383 (1914). Petitioner also requests review on the ground that the instant case reflects substantially different treatments that the various federal circuit courts have given to the question of jury instructions on the defense of entrapment.

The United States Supreme Court has firmly recognized the defense of entrapment in the federal courts. *Sorrells v. United States*, 287 U.S. 435. In many of the entrapment cases reviewed by this counsel, petitioners have requested the courts to hold that entrapment existed as a matter of law. This petitioner does not make that contention as he cannot. But he had a constitutional right to have the jury decide on the sufficiency of that defense and its applicability to his case.

Lopez v. United States, 373 U.S. 427 (1963) was the case relied on by the trial court as authority for not giving

the entrapment instruction. That case involved a factual situation far less susceptible to the entrapment instruction then the instant one. For instance, Mr. Lopez made the initial approach of bribery to the government agent. In the instant case, the petitioner was admittedly approached by the government agent. *Lopez* involved a government agent who made no false representations as to his occupation and duty. In this case, the government admittedly worked on the petitioner through some sympathy and confidence of his friend, while both government agents did not disclose their identity.

In the *Lopez* decision, the Court, at pages 434 and 435, said:

> "The conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officials and their agents . . . . Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least *some* showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged." (Emphasis supplied.)

It is submitted that in the instant case "some showing" was made. Therefore, resolution of the issue became a question to be decided by the jury.

In affirming the instant case, the Circuit Court of Appeals relied on two cases *United States* v. *Walton* (9 Cir. 1969) 411 F.2d 283; and *Chatham* v. *United States*, (9 Cir. 1969), 411 F.2d 1139. In the *Walton* case it appears that an entrapment instruction was, however, given. Of great significance is the fact that the Ninth Circuit, in *Walton*, said that recent Circuit Court entrapment decisions have held that the burden of proof to negate entrapment is on the government. Citing *Robison* v. *United States*, (9 Cir.) 379 F.2d 338, 345, the Court in *Walton*, at page 288 said:

> "The government had the burden of proving, beyond a reasonable doubt, that no such persuasion or pressure [for entrapment] was exerted."

The Fifth Circuit Court of Appeals has recently begun to hold that the defense of entrapment need not be submitted to the jury even though there exists "some" evidence of entrapment. *Pierce* v. *United States*, (5 Cir. 1969) 414 F.2d 163. On the other hand, in *Pierce* the Fifth Circuit has acknowledged that in five of its decisions it has held that the entrapment defense should be submitted to the jury ". . . whenever there is some evidence of an initial approach by the government."

Substantial disparity among the Circuits in the giving of the entrapment instruction has been pointed out by the Fifth Circuit in the *Pierce* decision. On page 167, footnotes, the court comments that under *Sagansky* v. *United States*, 358 F.2d 195, 202-203, the First Circuit would require the submission of the entrapment issue to the jury whenever there is evidence that would warrant a finding that the government merely initiated the opportunity for the defendant to commit the crime.

The United States Court of Appeals for the Second Circuit takes a different position. In *United States* v. *Riley*, (2nd Cir. 1966) 363 F.2d 955, the Court at page 959 said:

> " . . . even when inducement has been shown, submission to the jury is not required if uncontradicted proof has established that the accused was 'ready and willing without persuasion' and to have been awaiting any propitious opportunity to commit the offense."

But the Circuit Court of Appeals for the District of Columbia, in *Johnson* v. *United States*, 115 U.S. App. D.C. 63, 317 F.2d 127 (1963) in a decision by Judge Fahy, held that the furnishing by the officer of government money, itself a persuasive factor was enough

> "to raise the factual issue of official inducement for the jury to decide one way or the other."

Judge Bastian dissented in that same case.

It appears that the Court has left open for future con-

sideration certain issues touching on this case and this area of law. In *Lopez*, the Court at page 434, said:

> "Whether in the absence of a conclusive showing the defense is for the court or the jury, and whether the controlling standard looks only to the conduct of the Government, or also takes into account the predisposition of the defendant, are among the issues that have been [redacted] mooted."

III

WHETHER OR NOT DUE PROCESS HAS BEEN AFFORDED IN THE SELECTION OF THE JURY PANEL WHEN ALL BUT ONE SELECTED JUROR HAS BEEN CHOSEN FROM JACKSONVILLE, FLORIDA, RATHER THAN THE MIDDLE DISTRICT AT LARGE OR A DIVISION THEREOF

This question was raised by defendant Thrift's Motion to Quash Panel of Jurors and list of Jurors attached thereto as Exhibit No. 1 and the proffer made in support thereof. In the Motion for Judgment of Acquittal (Transcript, p. 235), appellant argued that the selection of jurors from an area restricted to Jacksonville, Florida, with the exception of one juror from Clay County, was not fair, and particularly so when the appellant did not reside in Duval or Clay County.

A trial court would have the authority to direct that a panel not be drawn from a certain designated area for good cause. The basic conception of a jury trial is that one be tried by his peers. There are 33 counties in the Middle District of Florida, and 14 in the Jacksonville Division. *U.S.* v. *Standard Oil Co.*, (DC), Ill. 1909, 170 F.998.

IV

WHERE PETITIONER SUFFERED SEVERE LEGAL CONSEQUENCES AS A RESULT OF CONVICTION ON AN INVALID COUNT OF THE INDICTMENT THE APPEALS COURT ERRED IN REFUSING TO REVIEW THE INVALID COUNTS

The Fifth Circuit Court of Appeals has refused to review the conspiracy conviction because petitioner received concurrent sentences, and the invalid conviction was therefore mooted. The Court said: "The concurrent sentence rule is not dead, though it has sustained non-mortal wounds." *Benton* v. *Maryland*, 1969 ___, U.S. ___, 89 S.Ct. ___, 23 L.Ed.2d 707.

But petitioner has the gravest of legal consequences as a result of the three convictions. He is a resident of Florida. That state has a recidivist law providing for mandatory life imprisonment upon a fourth conviction. Florida Statutes, 775.10. Since petitioner now has three convictions, it is important that any defective count of the indictment be reviewed.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

M. Michael Cramer

Attorney for Petitioner

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27285

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM EARL BIGHAM,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(January 28, 1970)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

GOLDBERG, Circuit Judge: William Earl Bigham, Jr. seeks a reversal of his conviction for conspiracy to possess and pass counterfeit United States currency for the possession of such currency, and for the sale of such currency. He was sentenced to five years on each of the three counts, the sentences to run concurrently. Ap-

pellant's appeal has three predicates: (1) geographic mal-distribution of persons on the jury list for the week of his trial in Jacksonville, Florida; (2) the refusal of the court to instruct the jury on the defense of entrapment; and (3) insufficiency of the evidence to support the conspiracy count.[1]

Although his argument is not entirely clear, appellant's objection to the jury seems to rest on the sole ground that the jury list for the week of his trial, December 9, 1968, was, with one exception, composed entirely of residents of Duval County, Florida, and contained no resident of his home county, Columbia County, Florida. Appellant does not appear to claim that prospective jurors were summoned only from Duval County or that classes or groups of persons were excluded from the jury list or that the list was chosen in violation of the federal statutes. Rather, he objects because after the list for the week was drawn, all but one person resided in Duval County. We find this objection without merit.[2] Appellant has offered no proof concerning the method used to select this jury

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[1]**Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy v. Houma Well Service*, 5 Cir. 1969, 409 F.2d 804, Part I; and *Huth v. Southern Pacific Company*, 5 Cir. 1969, ____ F.2d ____, Part I [No. 27439, Oct. 7, 1969].**

[2]This trial was concluded prior to the effective date of the Jury Selection and Service Act of 1968, 28 U.S.C.A. § 1861. However, even that salubrious legislation would not assist Bigham in the instant case. See, Gewin, The Jury Selection and Service Act of 1968: Implementation In the Fifth Circuit Court of Appeals, 20 Mercer L. Rev. 349 (1969), for a perceptive analysis of the Act and the methodology for the accomplishment of its purposes in the Fifth Circuit.

and has not shown that this list was not derived from a random selection of jurors from the Jacksonville Division. We take judicial notice of the fact that Duval County is by far the most populous county in the Jacksonville Division while the other counties are relatively small. Moreover, probabilities aside, we have not been shown any rule which requires that the jury selection process result in a list with at least one resident from each county in the division. In fact, the established rule is quite the contrary. In *Salary v. Wilson*, 5 Cir. 1969, 415 F. 2d 467, this court stated:

> "There is no constitutional requirement of proportional representation of the components of the community. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect proportionate strength of every identifiable group." 415 F. 2d at 472.

Bigham next seeks release from his conviction through the doctrine of entrapment. The basic facts as to the alleged inveiglement are clear. Secret Service agents arrested one Donald Westmoreland in possession of counterfeit federal reserve notes apparently obtained from the appellant. After his arrest Westmoreland cooperated with the agents by introducing Agent Quinn to Bigham as a prospective purchaser of counterfeit currency. Negotiations followed and Bigham delivered counterfeit notes to Agent Quinn. None of the minutiae of the meeting gives any indication that Quinn went beyond the mere affording of an opportunity to commmit the offense. He did not exert any pressure or persuasion which induced Bigham to commit the crime, and it is certainly beyond cavil

that Quinn did not create the disposition to sell the currency. No reasonable person could say that an innocent man was led astray by the blandishments of Agent Quinn. The elements of entrapment were therefore not shown to exist. *United States v. Walton*, 9 Cir. 1969, 411 F. 2d 283; *Chatman v. United States*, 9 Cir. 1969, 411 F. 2d 1139. Under these circumstances there was no occasion to charge the jury on the defense of entrapment, and to do so would have been misleading. *Pierce v. United States*, 5 Cir. 1969, 414 F. 2d 163, *cert denied*, 38 U.S.L.W. 3207 (U.S. Dec. 9, 1969).

Appellant's final complaint relates to the sufficiency of the evidence to sustain his conviction on the conspiracy count. We decline, however, to question the validity of Bigham's conviction on this count because of the concurrent sentences which he received on the possession and sale counts. The concurrent sentence rule is not dead, though it has sustained nonmortal wounds. *Benton v. Maryland*, 1969, ____ U.S. ____, 89 S.Ct. ____, 23 L.Ed. 2d 707. *Benton* does not give us a categorical imperative that a diseased count must always infect its fraternal counts. We think this is an appropriate case in which to exercise our judicial discretion to apply the concurrency rule as a matter of judicial convenience. *Benton v. Maryland, supra; Jordan v. United States*, 9 Cir. 1969, 416 F. 2d 338. We affirm the judgment of conviction on all counts except the conspiracy count which we find it unnecessary to consider.